

## REMARKS

Claims 18-47 are pending. Claims 18, 22, 26 and 29 are hereby amended to clarify that the claimed composition is free flowing. Claims 33, 41 and 45 are hereby amended to refer consistently to “mixed tocopherols.” No new matter is added by these amendments.

The Examiner has rejected claims 18-47 under 35 U.S.C. § 103(a) for obviousness over United States Patent No. 4,603,143 to Schmidt (“Schmidt”). Specifically, the Examiner asserts that Schmidt discloses a vitamin material, such as a tocopherol, adsorbed to silica. The Examiner also asserts that Schmidt “does teach that the particles are smaller than 150 microns.” Action, page 3. As such, the Examiner has shifted the burden to the Applicants to show that the silica disclosed by Schmidt does not possess the same characteristics as the silica claimed by the Applicants.

In response, the Examiner has not made a *prima facie* case for obviousness over Schmidt. *See, generally, Manual of Patent Examining Procedure (MPEP) 2143.* Applicants have amended claims 18, 22, and 29 for clarity, to positively assert that the composition is “free-flowing.” Schmidt discloses the use of three silica products to prepare their supplement: HI-SIL 231, SIPERNAT 22 and ZEOSYL 110SD. HI-SIL 231 has a size distribution much greater than 150 microns (87.6 % weight (wt.) retained by a 100 Mesh sieve (~150 microns), with 78.8 % wt. retained by an 80 Mesh sieve (~175 microns)), as indicated in Table I, spanning Columns 3-4 of Schmidt, and is considered by Schmidt to be within the invention claimed in Schmidt. Schmidt teaches that ZEOSYL 110SD has a size distribution of less than that of HI-SIL 231 (84 % weight retained by a 100 mesh screen, but only 17.4 % wt. retained by an 80 mesh sieve (see Table 1 of Schmidt)), and does not result in a free-flowing powder, as indicated in Example 2 (found in column 5) of Schmidt. Of note, Schmidt expressly asserts that the composition prepared with

ZEOSYL 110SD is not within the scope of their invention. *See*, Schmidt, Column 5, lines 10-11.

Although no example using SIPERNAT 22 is found in Schmidt, the size distribution of that silica product is less than that of HI-SIL 231 and ZEOSYL 110SD, as indicated in Table 1 of Schmidt, with only 35% wt. retained by an 80 Mesh sieve (Applicants note that the "Declaration of Charles A. Morris Under 37 C.F.R. § 1.132, dated September 4, 2003 (the "Morris Declaration"), and of record in the present application, indicates that SIPERNAT 22 also is not acceptable for processing according to the present invention, having a particle size of about 100 microns, well above the 40 to 50 micron range recited in the present claims).

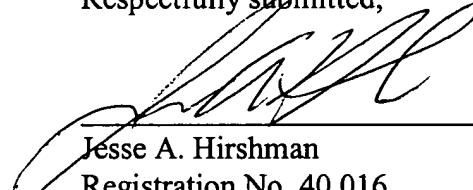
Contrary to the Examiner's assertions, there is no teaching in Schmidt that a silica product having a particle size less than 150 microns would be useful in preparing a free-flowing powder when combined with a vitamin, such as a tocopherol. In fact, Schmidt actually teaches away from using silica particles of less than 150 microns. Schmidt provides data showing that no silica products having a particle size of less than 150 microns, indeed, of less than 175 microns (80 Mesh), would be free flowing, and therefore would be useful in their invention. From that data, one could extrapolate that silica having particle sizes of less than 150 microns would interfere with the flowability of the final product. It is not a fair extrapolation, however, to assert, as the Examiner does, that use of silica particles of less than 150 microns would be *prima facie* useful in view of the data presented in Schmidt, and especially in view of the data presented in the present application and in the Morris Declaration, that use of silica particles of a size between those found in HI-SIL 231 and 40 to 50 microns does not result in a free-flowing product.

The Examiner has not made a *prima facie* case for obviousness because there is no showing in Schmidt that silica products of less than 150 microns would be useful in preparing a

flowable composition. If anything, Schmidt teaches the contrary, that use of a silica product having a particle size of less than about 150 microns would not result in a flowable material. For that reason, the Examiner has inappropriately shifted that burden to Applicants to show criticality of the claimed range. Applicants have provided evidence that is unexpected in light of the teachings of Schmidt -- that a free-flowing product can be produced using a silica product having a particle size of less than 150 microns. The Declaration only further supports that assertion by producing additional data showing the criticality of silica particle sizes within the claimed range. For this reason, Applicants respectfully request reconsideration of the rejections of claims 18-47 for obviousness over Schmidt.

Applicants believe that claims 18-47 define over the prior art of record and are in proper form for allowance. Applicants respectfully request allowance of claims 18-47. Applicants also request that the Examiner call the undersigned to discuss any additional questions or concerns with respect to the above-referenced patent application.

Respectfully submitted,



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